

REMARKS

Claims 15, 18-22 and 24 are pending. Claim 15 has been amended to clarify the subject matter Applicant regards as the invention. Claims 18 and 19 have been amended to correct minor typographical errors. No new matter has been added and entry of the amendment is respectfully requested.

There is Adequate Written Description for the Claims Subject Matter

Claims 15, 18-22 and 24 stand rejected under 35 U.S.C. § 112, first paragraph, as allegedly containing subject matter which was not described in the specification to reasonably convey to one skilled in the relevant art that the inventors, at the time the application was filed, had possession of the claimed invention. Applicant respectfully disagrees.

To satisfy the written description requirement, a patent application must describe the invention in sufficient detail that one of skill in the relevant art could conclude that the inventor was in possession of the claimed invention at the time the application was filed. *See Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563-64, (Fed. Cir. 1991). The Federal Circuit in *Union Oil of California*, made it clear that an applicant need not precisely recite each and every element of a claim limitation in the specification in order to satisfy the written description requirement. *See Union Oil of Cal. v. Atlantic Richfield Co.*, 208 F.3d 989 (Fed. Cir. 2000).

The facts of the present case are reminiscent of the facts in *In re Wertheim*, 191 USPQ 90 (CCPA 1976). In *In re Wertheim*, applicant recited a range in the specification from 25-60% solid content along with specific embodiments at 36% and 50%. *Id.* at 98. The CCPA held that, "as a

factual matter, persons skilled in the art would consider processes employing a 35-60% solids content to be part of appellant's invention" Id.

In the present case, the specification discloses formulas with a lipid concentration range from 0.1-50%. Specification at page 5, lines 3-10. The examples recite particular embodiments that contain 1.0% phospholipids (Example 1, formulas 1 and 2), 2.0% phospholipid (Examples 2, 3 and 4). Thus, literal support for these and other range boundaries can be literally derived from the specification as filed.

The Office acknowledged the disclosure noted above in the last action. However, the Office persists in the notion that while in order for a range in a claim to be adequately supported, that range must be explicitly disclosed. As the discussion in *In re Wertheim* illustrates, this position of the Office is in error and should be withdrawn.

The Office further rejected the pending claims under 112, first paragraph, for reciting the transition phrase "consisting essentially of". While Applicant respectfully disagrees with the Office on this point, solely to advance prosecution of the present case, Applicant has amended independent claim 15 to remove this phrase. As such, the reasons for this rejection have been overcome.

The Pending Claims are Particular and Definite

Claims 15, 18-22 and 24 were rejected under 35 U.S.C. § 112, second paragraph, for allegedly failing to particularly and definitely claiming the subject matter Applicants regard as their invention. This rejection is based on the perceived conflict existing between the former transition phrase of claim 15 and the subject matter recited in claims 20 and 21. In view of the amendments to

claim 15, this perceived conflict is resolved. Accordingly, it is believed this basis for rejection may be withdrawn.

The Mehansho Reference

In the conclusion of the final Office Action the Office has alleged that Applicant has misrepresented the teachings of the Mehansho reference. Applicant regrets any misunderstanding the may have arisen from the previously submitted response.

Applicant will take this opportunity to note that the Mehansho reference does not teach or suggest a phospholipid content in the claimed range. The ratios discussed at column 7, lines 11-24 refer to ratios of emulsifier to edible substrate. These ratios have little or nothing to do with the total amount of emulsifier in the compositions discussed in Mehansho. When one turns to the examples of the Mehansho patent, it is clear that the inventors were contemplating inclusion of only small amounts of emulsifier in the total product. In light of this discussion, based solely on observations from the cited reference, Applicant submits that this reference fails to anticipate or render the pending claims obvious.

CONCLUSION

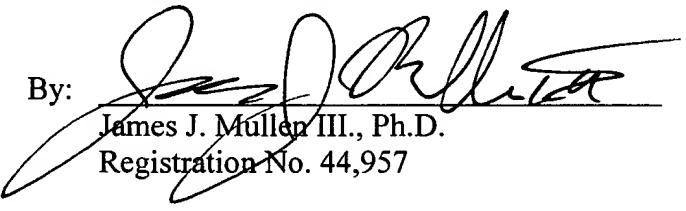
In view of the above, each of the presently pending claims in this application is believed to be in immediate condition for allowance. Accordingly, the Examiner is respectfully requested to withdraw the outstanding rejection of the claims and to pass this application to issue. If it is determined that a telephone conference would expedite the prosecution of this application, the Examiner is invited to telephone the undersigned at the number given below.

In the unlikely event that the transmittal letter is separated from this document and the Patent Office determines that an extension and/or other relief is required, applicants petition for any required relief including extensions of time and authorize the Assistant Commissioner to charge the cost of such petitions and/or other fees due in connection with the filing of this document to **Deposit Account No. 03-1952** referencing docket No. 270142000300.

Respectfully submitted,

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